



Janice K. Brewer
Governor

State Of Arizona Board of Podiatry Examiners

"Protecting the Public's Health"

1400 W. Washington, Ste. 230, Phoenix, AZ 85007; (602) 542-3095; Fax: 542-3093

Barry Kaplan, DPM; Joseph Leonetti, DPM; Barbara Campbell, DPM;
M. Elizabeth Miles, Public Member; John Rhodes, Public Member; Sarah Penttinen, Executive Director

BOARD MEETING MINUTES

January 8, 2014; 8:30 a.m.
1400 West Washington St., B1
Phoenix, AZ 85007

Board Members: Joseph Leonetti, D.P.M, President
Barry Kaplan, D.P.M., Member
Barbara Campbell, D.P.M., Member
M. Elizabeth Miles, Secretary-Treasurer
John Rhodes, Public Member

Staff: Sarah Penttinen, Executive Director

Assistant Attorney General: John Tellier

The items listed were not reviewed in the order in which they appear in the minutes.

I. Call to Order

The meeting was called to order at 8:32 a.m.

II. Roll Call

Dr. Leonetti noted for the record that Ms. Miles was absent. All other Board members were present as well as Ms. Penttinen and Mr. Tellier.

III. Approval of Minutes

a. November 13, 2014 Regular Session Minutes

MOTION: Dr. Campbell moved to approve the minutes with typographical corrections. Dr. Kaplan seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

b. December 11, 2014 Regular Session Minutes

Dr. Kaplan offered a correction regarding case number 12-18-C. Dr. Jerome Cohn was the investigator for that case, but there were two sentences which stated Dr. Mark Forman was the investigator. There was brief discussion regarding the Call to the Public and the information reported by the Board's Executive Director which included her contact with a previous license applicant. Dr. Leonetti stated he wanted to be certain that the minutes accurately reflect the necessary information but wanted Mr. Tellier's opinion as to whether extensive detail is required. Mr. Tellier advised that comments from members of the public should be detailed; however, comments from Board staff are not necessarily considered a call to the public. The Board members were in agreement to remove the Executive Director's report from this section of the minutes and to document that information in the applicant's file.

MOTION: Dr. Leonetti moved to approve the minutes with the amendments as discussed. Mr. Rhodes seconded the motion.

DISCUSSION: There was no further discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

IV. Review, Discussion and Possible Action –Review of Complaints

a. 13-06-C – Barbara Aung, DPM: Improper care due to indicating use of orthotics that did not provide relief; improper billing due to charging for services that did not provide relief of symptoms. Update from investigator regarding medical records.

Dr. Aung was not present. Dr. Leonetti reviewed that when this case was heard at the last meeting there was concern that the patient had requested a copy of their records from Dr. Aung but had not received

them as of the time the complaint was filed. The Board wanted the investigator, Dr. Forman, to contact both the complainant and Dr. Aung to find out when or if the records were sent. Ms. Penttinen had provided an update from Dr. Forman indicating that when he contacted Dr. Aung he was told that the records were never sent because the patient never told Dr. Aung where they were supposed to be sent. Dr. Forman did not contact the patient. Dr. Leonetti stated he wanted to make sure there was adequate follow-up because Ms. Miles had expressed concern as a member of the public that the patient be able to receive their records. Ms. Penttinen explained that Dr. Forman told her that Dr. Aung had never sent the records and asked her if he still needed to contact the patient. At that time she told him that his contact with Dr. Aung was sufficient. However, she did attempt to contact the patient to determine if the records had been received and has not heard back from them yet. The Board members reviewed that according to the complaint the patient made several attempts to obtain her records and it must have been very apparent that the patient wanted a copy of their records. Dr. Leonetti suggested that, because she is supposed to appear at the February meeting on another case, Dr. Aung should be advised that the Board specifically wants to discuss this case as well to determine why the records were never sent. He would like further attempts made to contact the patient in this regard. He also feels there is some type of problem with Dr. Aung not being able to access her complete patient records. The remaining Board members were in agreement. There also was brief discussion regarding why there was no documentation in the chart regarding the patient receiving copies of their records. Ms. Penttinen will follow up with Dr. Forman to complete this and with Dr. Aung to specifically advise her of the Board's request to speak with her regarding this matter.

MOTION: Dr. Leonetti moved to table this matter for further follow-up as discussed. Dr. Kaplan seconded the motion.

DISCUSSION: There was not discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

V. Review, Discussion and Possible Action – Probation / Disciplinary Matters

a. 09-17-B – J. David Brown, DPM: Monthly update.

Dr. Leonetti reviewed that the Board is in receipt of a progress report from Dr. Sucher which indicates that Dr. Brown is in compliance with all monitoring requirements. Ms. Penttinen added that she recently reviewed the compliance file and consent agreement and realized that Dr. Brown's relapse prevention evaluation is overdue; it was supposed to be completed 18 months prior to the end of his probation and he is now nine months from the end of probation. Ms. Penttinen has contacted Dr. Sucher who advised her that the evaluation has not been done. Ms. Penttinen has asked Dr. Sucher to contact Dr. Brown to get this completed. The Board members did not feel that the absence of the evaluation requires any action at this time because Dr. Brown has maintained contact with the Board and compliance with the monitoring requirements; however, the evaluation needs to be done as soon as possible. Ms. Penttinen will follow up with Dr. Sucher.

b. 11-09-M – Kelvin Crezee, DPM: Monthly update.

Ms. Penttinen reviewed that under Dr. Crezee's consent agreement he has until January 21, 2014 to complete the presentation on wrong-site surgery that he is required to do. The presentation content was previously approved by the Board and Dr. Crezee is aware of that. However, as of today's date Ms. Penttinen has not received any documentation from Dr. Crezee that he has actually completed the presentation. Ms. Penttinen asked if it would be appropriate to send Dr. Crezee a reminder. The Board members agreed that a reminder should be sent to Dr. Crezee and ask him to provide proof of completion.

c. 13-05-B – Kathleen Stone, DPM: Monthly update.

Ms. Penttinen advised that the last report from Dr. Stone regarding her counseling requirement was received in December so the next one will be due in March. Also, Dr. Stone's dispensing registration has been reinstated.

VI. Review, Discussion and Possible Action on Administrative Matters.

a. Election of Board officers.

MOTION: Dr. Leonetti moved to elect Dr. Campbell as Board President. Dr. Kaplan seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

MOTION: Dr. Leonetti moved to elect Mr. Rhodes as Board Secretary-Treasurer. Dr. Kaplan seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

b. Discussion regarding physicians who are not sending complete records in response to subpoenas.

Dr. Leonetti reviewed that there has been an ongoing issue for many years where podiatrists are not submitting complete records when they receive a subpoena for such. Over the years, the Board's subpoenas have been modified to try to address each specific item that needs to be included when "complete records" are requested; however, the Board still receives incomplete charts. Dr. Leonetti stated that when the subpoena requests complete records, and the licensee is aware that the records are being requested due to a complaint investigation, if complete records are not submitted then he feels an allegation should be added to the complaint for failure to provide complete records in a timely manner. Ms. Penttinen reviewed A.R.S. §32-854.01(17) which essentially defines a licensee's failure or refusal to provide records to the Board. Mr. Tellier added that the Board has the ability to enforce subpoenas in Superior Court. He also added that a failure to produce records can lead to what is called an adverse inference, meaning that the Board could infer that the information contained in the records, (had they been produced), is negative to the licensee and that is why they are not producing them. Dr. Campbell asked if that would be the same as an assumption of guilt. Mr. Tellier stated the inference is that if the information in the records was not bad then they would have given them to the Board.

Dr. Kaplan added that the advent of EMR is also causing complications and the potential for elimination of records. Ms. Penttinen asked Mr. Tellier about the burden of proof and whether the absence of records would then lend more credibility to a patient's allegation(s), and Mr. Tellier agreed that it could. Dr. Kaplan also asked whether type-written records are still being requested. Ms. Penttinen advised that she had done so on a case-by-case basis but can add that as a routine request in the subpoenas. There was brief discussion regarding what types of formatting modifications or instructions could be or should be added to the subpoenas to make sure the licensees understand what is being requested. Dr. Leonetti suggested adding language to the effect of the "adverse inference" mentioned by Mr. Tellier. He added that when multiple requests have to be made to obtain complete records it causes too many delays and the Board should take specific action to ensure that licensees are sending complete records the first time they are asked. The Board members suggested that Ms. Penttinen add a page to the subpoenas which specifies what is meant by "complete records." Ms. Penttinen stated she could add a bullet point list to the affidavit page of the subpoena.

Dr. Leonetti added that he is concerned that cases are coming before the Board when the complete records have not been reviewed by the investigators. Ms. Penttinen stated that she has advised the investigators to notify her when records are incomplete but she could send them a reminder of this. Dr. Leonetti suggested that a discussion or training session be conducted with the investigators to inform and/or remind them of the information that they need to be looking for when they are reviewing cases. Dr. Campbell stated she will develop such a training session to review all of this with the investigators. Ms. Penttinen will work with Dr. Campbell to schedule a conference call or meeting time when all investigators are available to participate at the same time.

c. Social media advertising and associated fee structures.

Dr. Leonetti reviewed that he is now aware of a medical office in Scottsdale which is owned by an M.D. who has hired a podiatrist as an independent contractor. The M.D. is using social media advertising for treatment of fungal toenail infections but the treatment is being performed by the podiatrist. Dr. Leonetti asked, since the podiatrist is not the person doing the advertising, if this is a loophole for them to get around the issue of fee splitting. Mr. Tellier advised that by legal definition an independent contractor is not an employee of the business with whom they have contracted. If they are an "employee" then there is no fee splitting; however, if they are receiving compensation for actual services rendered, (on a per-service basis), then there is likely a problem. Mr. Tellier added that there are many different factors in

determining if they would be considered an employee or if they truly are an independent contractor, and there also may be other implications such as practicing under a trade name or practicing under the name of another healthcare practitioner. He stated he would like to see a copy of the independent contractor's contract to make a better determination. Dr. Leonetti stated his understanding is that this company provides to the podiatrist the facility in which to work and all necessary equipment, they make all appointments, and the podiatrist is paid under a 1099. Mr. Tellier stated that sounded more like an "employee" arrangement. Dr. Leonetti stated he may be able to obtain a copy of the contract for the business in question.

Ms. Penttinen suggested that the Board may want to consider its current definition of fee splitting for a potential change to that definition in the future. She stated that other healthcare regulatory boards have not considered social media advertising to be fee splitting, but those agencies' definitions of the term relate more directly to the prohibition of unnecessary referrals with kickbacks. It was clarified that the prohibition of "fee splitting under any guise whatsoever" is language which is specific only to this Board. Ms. Penttinen suggested that if the Board feels it is appropriate she could gather information from the other boards regarding their definitions related to fee splitting and report that information back to the Board for review. Mr. Tellier added that the Board has been correct in its interpretation of the current definition of fee splitting but it may be something to consider modifying in the future, keeping in mind the Board's role in protecting the public. Dr. Leonetti added that he is aware that in the state of New York, Groupon changed its fee structure because of this type of problem so that healthcare practitioners could utilize that form of advertising without it being considered fee splitting.

Ms. Penttinen clarified for Dr. Leonetti that she had received an email from Dr. Niemann who had previously been investigated by the Board regarding his use of social media advertising. Dr. Niemann had indicated that he was looking into different contract terms with Groupon and wanted to know if it would still be considered fee splitting. She advised him to send her a copy of the new contract but he has not done so. Dr. Leonetti stated that the Board could not advise him and that he should consult an attorney. Ms. Penttinen also had advised Dr. Niemann to seek legal advice and to refer to the Board's substantive policy statement on this issue.

d. Malpractice case report.

- i. Joseph Leonetti, DPM: Settlement in the case of patient T.M.

Dr. Leonetti recused himself from the discussion and Dr. Kaplan served as acting President. Ms. Penttinen reviewed that the Board had received a report of a malpractice case involving Dr. Leonetti which was settled in favor of the patient. The Board is asked to determine if a complaint investigation case is to be opened.

MOTION: Dr. Kaplan moved to open a complaint investigation case regarding this matter. Mr. Rhodes seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

Following the vote, while still recused, Dr. Leonetti asked to address the Board members. He was accompanied by attorney Doug Cullins. He stated he is in agreement with the Board members' decision to investigate this matter as any other malpractice case would be. His only concern is with regard to the investigator who eventually is assigned to this case. He feels that the use of any investigator from outside the state of Arizona may not be appropriate because that person likely will not be appropriately familiar with the scope of practice and standard of care here. He feels that the investigators currently utilized by the Board are appropriate investigators and are familiar with the laws pertaining to podiatry in Arizona. Dr. Kaplan agreed with Dr. Leonetti's statements. Dr. Kaplan also reviewed that each of the physician Board members has had a complaint investigation come before the Board and there were no special steps taken with regard to the investigator assigned to those cases. He added that with any investigator, and as with any other case brought before the Board, the Board members can determine whether or not the investigator's review was appropriate. He feels that impartiality can be maintained by both the investigator and the Board. Dr. Campbell asked if it would be appropriate to make a recommendation at this time regarding who should be assigned to investigate this case. Dr. Kaplan stated he would recommend Dr. Cohn due to his availability and the likely large volume of records to

review. Dr. Campbell agreed. Mr. Cullins addressed the Board regarding the confidential nature of the settlement agreement. He asked that if the amount of the settlement were ever to be discussed that such discussion take place in Executive Session. He added that the amount of the settlement, as with many malpractice cases, is not related to the care provided or any alleged deviation from the standard of care. The Board members agreed with Mr. Cullins' request.

VII. Executive Director's Report – Review, Discussion and Possible Action

a. Open complaint status report.

Ms. Penttinen reviewed the most recent case on the report, 13-36-C, and advised that after speaking with Mr. Tellier it will be administratively closed. The complainant had received a civil judgment against a podiatrist, not a malpractice case or related to the practice of podiatry in any way, and the podiatrist has not satisfied the judgment. This type of issue is not under the Board's jurisdiction. (A case number was assigned to track receipt of the complaint but the licensee has not been sent a Notice letter yet and none will be sent.) There also was one case that has been closed so its presence on the report is an error. With those deletions there are currently 62 open cases. Eight are presently assigned to investigators and there are an additional nine which are ready to be assigned. The remainder are still in process of obtaining records and responses from the subject of the complaint. Ms. Penttinen clarified for Dr. Leonetti that each of the open cases relate to quality of care allegations which require a physician investigator. The Board members were in agreement that some of the smaller cases could be assigned to a physician Board member in order to expedite their completion. Dr. Leonetti also stated that Dr. William Leonetti is now available again to serve as an investigative consultant. Ms. Penttinen also confirmed that she is coordinating the cases as much as possible so that review of multiple cases for the same licensee can be reviewed together.

VIII. Call To The Public

There were no requests to speak during the Call to the Public.

IX. Next Board Meeting Date:

a. February 12, 2014 at 8:30 a.m.

X. Adjournment

MOTION: Dr. Kaplan moved to adjourn the meeting. Dr. Campbell seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote and the meeting was adjourned at 10:02 a.m.